# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 588.

AMERICAN EXPRESS COMPANY, OF NEW YORK, . *Plaintiffs in Error,*

vs.

THE COMMONWEALTH OF KENTUCKY.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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## STATEMENT.

This case is advanced for hearing with cases *Nos. 331 and 332, Adams Express Company v. The Commonwealth of Kentucky*, involving similar questions and arising out of the same statute. The case arises upon a writ of error from this court to the judgment of the Court of Appeals of Kentucky, the highest court of that State, affirming the judgment of the Circuit Court of Larue County, convicting the plaintiffs of selling liquor in local option territory in that county, (*Rec. 4, 25*), in violation of *Chapter 14, Acts of 1902, page 41, et seq.*, and especially *Sec. 4* of said act, constituting *Sec. 2557 B*, and especially *sub-section 4* of said section, of the *Kentucky Statutes, Edition 1903*, as follows:

"All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called 'C. O. D. shipments,' into any county, city, town, district

or precinct where said act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The first step in this case was a warrant from the Hodgenville Police Court (*Rec. 1*), and a fine of $100.00 was imposed by that court (*Rec. 2*), and upon a trial *de novo* a similar judgment was rendered by the Circuit Court (*Rec. 4*), and affirmed by the Appellate Court, as aforesaid (*Rec. 25*). The Circuit Court's judgment was upon a verdict of a jury which was instructed by the judge as follows (*Rec. 15*):

"1. The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, The American Express Company, in the City of Hodgenville, Larue County, Kentucky, within twelve months before the issual of the warrant herein sold whiskey in less quantity than five gallons at one time to Richard Graham, and received from Graham the charge therefor, you should find the defendant guilty as charged in the warrant, and fix its punishment at a fine in any sum not less than $60.00, nor more than $100.00, or at confinement in the county jail for any time not less than ten days, nor more than forty days, or at both such fine and imprisonment.

"2. The court further instructs the jury a delivery of said whiskey in Hodgenville C. O. D. was a sale, unless said whiskey had been ordered by said Graham previously of the consignor, M. E. Stone.

"3. If the jury believe from the evidence that Richard Graham sent to M. E. Stone, at Cincinnati, Ohio, a written order to ship to him said whiskey at Hodgenville,

and that said Stone shipped said whiskey to Graham by the American Express Company, and said Express Company delivered said whiskey to Graham and collected the charge therefor, they should find defendant not guilty.

"4. If the jury believe from the evidence that defendant American Express Company did not know, nor had reasonable ground to believe that the package delivered contained whiskey, they should find for defendant.

"5. If they have a reasonable doubt of the defendant having been proved guilty they should find it not guilty."

The petition for a rehearing (*Rec. 32, et seq.*) was overruled (*Rec. 38*), whereupon the judgment became final.

The Court of Appeals, *Rec. 26, et seq.*, affirmed the judgment of conviction aforesaid, although assuming that the consignor received an order purporting to come from the consignee to ship the liquor aforesaid, upon the ground that a genuine order from consignee to consignor to ship the liquor was indispensable to the existence of interstate commerce. After quoting the order (*Rec. 28*) the court said (*Rec. 29*):

"If there was any evidence in this case that the whiskey was not ordered by Graham from the Cincinnati Company; that the pretended order therefor upon which his name appears was a forgery, and that the appellant Express Company knew it was whiskey when received and delivered by it, the verdict should be permitted to stand. There was evidence on both sides of these several propositions, but the jury had the right to accept the statements of Graham that he did not know and had never heard of the Cincinnati Company before receiving the package in question; that he had never ordered any whiskey of them, and had never signed the written order

or authorized it to be written or forwarded, as against the statements of Stone the manager of the Cincinnati shipper, that he had received the order."

After reciting that plaintiffs failed to introduce as witnesses its Cincinnati receiving agent and its train messenger "that they might acquit themselves and it of the imputation of knowledge as to its (the package's) contents," the court said:

"It may be said here as held in Adams Express Company vs. Comlth. 92 S. W. 932: 'The Commonwealth proved facts which of themselves established the guilt of the defendant company.' It showed the existence of the prohibition law in the town of Hodgenville, the delivery of liquor by appellant to Graham, and the payment of the price by the latter to its agent. These facts make a case for the Commonwealth, unless appellant's explanation of the transaction presented such a defense as took it out of the statute, the burden of showing which was upon it. If the jury were of the opinion that this was not done by the evidence it had the right to find appellant guilty."

The court's conclusion, however, practically precludes the carrier's exoneration in any case, viz.:

"If such a transaction as is here presented is permitted, it would not only render impossible the enforcement of prohibition in local option districts, but would also, in large measure, place the retailing of spirituous liquors in this State in the hands of irresponsible foreign dealers, who, though not themselves amenable to the jurisdiction and process of the courts of the State, can, through their willing instruments, the express companies, violate its laws with impunity. We can not afford to set in motion such a train of evils."

## Assignment of Errors.

To the judgment of the Appellate Court plaintiffs assigned errors as follows, *Rec. 39 :*

*a.* In adjudging that the *statute* aforesaid was not in conflict with *Article 1, Sec. 8*, commonly called the "*Commerce Clause*" of the *Constitution of the United States* and in deciding that the transportation by plaintiffs of the liquor in question from Cincinnati, Ohio, to Hodgenville, Kentucky, was not commerce among the several States ;

*b.* In adjudging that the transportation of the liquor from Ohio to Kentucky did not constitute commerce among the several States within the intent of the *Federal Constitution*, because the jury and trial court had decided that the written order received by the consignor to ship the whiskey to the consignee had not been actually executed by the consignee nor by anyone authorized by him to execute it;

*c.* In affirming the judgment of the trial court denying to the plaintiffs the immunity and privilege specially set up and claimed under the *Commerce Clause* of the *Constitution* by instructing the jury to find plaintiffs guilty under the Kentucky Statute aforesaid if the consignee did not actually give to or upon the consignor an order to sell and ship said whiskey ;

*d.* In affirming the judgment of the trial court denying to plaintiffs in error the immunity and privilege specially set up and claimed under the *Commerce Clause* aforesaid of the *Constitution* by instructing the jury to convict plaintiffs under the *Kentucky Statute* aforesaid, if said plaintiffs knew or had reasonable ground to believe that the package by them transported from Cincinnati to Hodgenville contained

intoxicating liquor, although said transportation was, as claimed by plaintiff, commerce among the several States;

*e.* In deciding that the *Kentucky Statute* aforesaid, construed by the trial court to require plaintiffs' conviction of guilt from the mere act of transportation C. O. D. of intoxicating liquor into local option territory, did not, as was specially set up and claimed by said plaintiffs, deprive them of their liberty or property without "due process of law" in denying to them the presumption of innocence and in requiring them to establish affirmatively their innocence and to suffer conviction of guilt unless they affirmatively proved their innocence of the offense charged or their justification under the Federal Constitution.

## ARGUMENT.

Analyzed and succinctly formulated, the doctrines of the Kentucky decision are, *first*, that transportation C. O. D. and delivery of intoxicating liquor into local option territory by a common carrier, although brought therein from another State, constitute a sale in such territory and are not interstate commerce unless the shipment be pursuant to a previous order from the consignee upon the consignor to ship the liquor; and, *secondly*, that under the Kentucky Statute transportation and delivery of the liquor C. O. D. in local option territory make a *prima facie* case of guilt. Accordingly, the Kentucky Court affirmed the Circuit Court's judgment of conviction based upon a verdict grounded upon an instruction, or charge, (*Ins. 2, Rec. 29*) that "a delivery of said whiskey in Hodgenville C. O. D. was a sale, unless said whiskey had been ordered by said Graham previously of the consignor, M. E. Stone."

The Kentucky Court (*Rec. 30*) discusses the carrier's knowledge on the subject of the consignee's order for the liquor, but it is not clear whether the knowledge is consid-

ered as an element of guilt under State jurisprudence, or as material to the question of the existence of interstate commerce. No issue as to the carrier's knowledge was submitted to the jury, nor did the jury find that the carrier had any knowledge of the falsity of the order. The instruction to the jury was unqualified, to convict unless the order previously existed.

I.

**Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.**

The introduction of the question of the carrier's knowledge, if intended to affect the *federal question*, makes confusion of ideas for transportation from one State to another, is commerce, and the transportation must not be impeded by the requirement that the carrier shall determine the nature of the transaction, or the existence or absence of a transaction, between consignor and consignee. If transportation interstate be interstate commerce, the carrier's opinion upon the nature of the transaction, or his surmises as to the existence or absence of a transaction between consignor and consignee are immaterial; on the other hand, if transportation be not interstate commerce except when an incident to a bargain and sale, or other transaction, between consignor and consignee, still the carrier's information or surmises upon the nature of the transaction *inter alios* is immaterial because an interstate transaction between consignor and consignee must exist, regardless of the carrier's knowledge of it or surmises regarding it, in order that transportation as an incident to such interstate transaction may constitute interstate commerce.

The Kentucky Court's requirement of an *order* "*by Graham previously of the consignor, M. E. Stone*" implies that plaintiffs' transportation of liquor could not be interstate commerce unless Stone had sold Graham the liquor upon the latter's order before the liquor was delivered to the carrier at Cincinnati. The essence of the doctrine thus promulgated is that transportation between States can not constitute interstate commerce unless incidental to a transaction between parties residing or located in different States. This doctrine is unsound, as is demonstrable from divers decisions of this court. The doctrine would determine transportation of passengers not to be interstate commerce because not based upon any transaction between persons located in different States; also would determine transportation for one of his own goods from one State to another not to be interstate commerce; also determine transportation to the "shipper's order notify" with draft attached to bill of lading, not to be interstate commerce although this court has repeatedly held all such transportations to constitute interstate commerce, and has emphatically declared, and reiterated it, that transportation itself constitutes interstate commerce independently of the transaction between consignor and consignee.

In the *Passenger cases, 7 How. 283*, this court held transportation of passengers to be interstate commerce, and reaffirmed the doctrine in *Hall v. DeCuir, 95 U. S. 485, 24 L. Ed. 547; Pickard v. Pullman, etc., Co., 117 U. S. 34; Louisville, etc., Ry. Co. v. Miss., 133 U. S. 589, 33 L. Ed. 785; Plessy v. Ferguson, 163 U. S. 546, 41 L. Ed. 256; C. & O. Ry. Co. v. Kentucky, 179 U. S. 388, 45 L. Ed. 244, etc.*

In *Scott v. Donald, 165 U. S. 58, 41 L. Ed. 632*, this court declared the existence of interstate commerce indiffer-

ently of several shipments, one made by the plaintiff to his own order, and others, apparently, by other persons to plaintiff's order; and in *American Express Co. v. Iowa, 196 U. S. 144, 49 L. Ed. 422*, said (although speaking of a contract made in Illinois for shipment into Iowa), concerning a C. O. D. shipment:

> "If upheld, the doctrine (of the State of Iowa) would deprive a citizen of one State of his right to order merchandise from another State at the risk of the seller as to delivery. It would prevent the citizen of one State from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the State where made, to the laws of another State; and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

Not only is it established that interstate transportation of passengers constitutes interstate commerce; that interstate transportation of goods consigned by one for delivery to his own order, constitutes interstate commerce; that interstate transportation to the shipper's order with draft for the price attached, and interstate C. O. D. shipments constitute interstate commerce irrespective of the devolution of title;

but it has been twice lately declared with emphasis that interstate transportation constitutes interstate commerce independently of the transactions between consignor and consignee; thus,

In *Hanley v. K. C. Sou. R'y Co., 187 U. S. 617, 47 L. Ed. 333*, an injunction was perpetuated restraining the Arkansas Railroad Commissioners from fixing and enforcing rates of transportation between two points in Arkansas over a route passing through the Indian Territory, upon the ground that although the transaction between consignor and consignee was between persons at points wholly within Arkansas the transportation was interstate commerce independently of the transaction between them. In announcing its opinion this court said, *p. 619*:

> "It may be assumed further, as implied by the language just quoted, that the transportation in the present case was commerce." Citing *Act of February 4, 1887, Gloucester Ferry Co. v. Penn., 114 U. S. 196, 203, and Wabash, etc., Co. v. Illinois, 118 U. S. 557*:
>
> "Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered."
>
> "No one contends that the regulation could be split up according to the jurisdiction of state or territory over the track, or that both state and territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress." (*Citing authorities.*)
>
> "It is decided that navigation on the high seas between ports of the same State is subject to regulation by Con-

gress (*Lord v. Steamship Co., 102 U. S. 541*), and is not subject to regulation by the State (*Pacific Coast Steamship Co. v. Railroad Commissioners, 9 Sawyer, 253*); and, although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.'" (*9 Sawy. 258, etc.*)

In the *Lottery Case, 188 U. S. 321, 47 L. Ed. 492*, this court considered the constitutionality of an act of Congress for the suppression of lottery traffic through interstate commerce, etc., and held that lottery tickets were subjects of traffic, and their transportation by carriers from one State to another was interstate commerce, which Congress might prohibit under its power to regulate such commerce. In an elaborate review of the authorities, this court quoted at length from many of its previous decisions, *e. g.* from *Gibbons v. Ogden, 9 Wheat. 1, 189, 194, as follows (p. 346):*

"The counsel for the appellee would limit it (commerce) to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. * * * It has been truly said that commerce,

as the word is used in the Constitution, is a unit, every part of which is indicated by the term;"

quoted Mr. Justice Johnson's language as follows:

"My opinion is founded on the application of the words of the grant to the subject of it. The 'power to regulate commerce' here meant to be granted was that power to regulate commerce which previously existed in the states."

From the *Passenger Cases, 7 How. 283, quoted as follows* (Mr. Justice McLean's language):

"Commerce is defined to be 'an exchange of commodities.' But this definition does not convey the full meaning of the term. It includes 'navigation and intercourse.' That the transportation of passengers is a part of commerce is not now an open question."

Mr. Justice Grier's language:

"Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that commerce."

From *Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, 9, 12*, this court quoted Chief Justice Waite's declarations that "commercial intercourse" was an element of commerce, that the powers of Congress kept pace with new inventions, and that "as they were intrusted to the General Government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation;" and from *Mobile v. Kimball, 102 U. S. 691*, quoted Mr. Justice Field's

language that commerce "consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

From *Pickard v. Pullman, etc., Co., 117 U. S. 314*, this court quoted that to tax "the transit of passengers from foreign countries or between the States is to regulate commerce."

Further reviewing authorities this court said that in *W. U. Tel. Co. v. Pendleton, 122 U. S. 347, 356*, it had recognized the commerce with foreign countries and among the States which Congress could regulate as including not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders and intelligence.

This court in reviewing *Cov., etc., Bridge Co. v. Kentucky, 154 U. S. 204, 218*, condemning a State Statute relating to "tolls to be charged or received for passing over the bridge" between Covington, Ky., and Cincinnati, O., said that it was a State enactment held unconstitutional as an unauthorized regulation of interstate commerce, and quoted as follows:

> "Commerce was defined in *Gibbons v. Ogden, 9 Wheat. 1, 189*, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the Bridge Company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across the river."

Finally, this court said, *p. 352*:

"At the present term of the court we said that 'transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.' *Hanley v. Kansas City Southern Railway Co., 187 U. S. 617.*

"This reference to prior adjudications could be extended if it were necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph," etc.

From the foregoing sufficient, although incomplete, review of the authorities it adequately appears that as long ago as the time of *Gibbons v. Ogden* this court had declared, and that it has ever since adhered thereto, that commerce is not confined to "traffic" nor to "buying and selling or the interchange of commodities," but that in addition thereto it includes "intercourse."

If this court had never decided the *Covington, etc., Bridge case*, nor *Hanley v. K. C., etc., R. R. Co.*, nor the *Lottery case*, nor any of the cases governing the transportation of passengers, nor the transportation of goods for one for delivery in another State to his own order, nor to his own "order notify," it could be argued with little plausibility that this court in the numerous cases from which we have made the foregoing quotations had declared transportation to be commerce only when considered in connection with an actual bargain and sale, or exchange of commodities between per-

sons in different States, but in the face of the decisions last enumerated, and others, this can not be affirmed.

In *Gibbons v. Ogden*, *supra*, this court said that commerce comprehended navigation, and that commerce was "intercourse;" in the Passenger cases said that it included "navigation and intercourse." It is thus evident that this court thus early meant to declare that the *Commerce Clause* was not confined to the regulation of barter and of bargain and sale, but must extend to the regulation of transportation. It was, therefore, in line with the earliest decisions of this court to hold the transportation of passengers, or as expressed in *Pickard v. Pullman, etc., Co.* the "transit of passengers," transportation for one of his own goods into another State, transportation interstate of goods consigned to the shipper's order with draft attached, and finally transportation *irrespective and independently of the transaction, if any*, between consignor and consignee to be interstate commerce. When, therefore, this court has said emphatically in *Hanley v. K. C., etc., R. R. Co.* and repeated it in the *Lottery case*, that interstate commerce is "transportation for others, as an independent business, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered," how can it be correctly decided that transportation is only interstate commerce when an incident to an actual sale between consignor and consignee? It has been repeatedly declared by this court that one of the chief reasons for the adoption of the Commerce Clause was the prevention of the imposition by the States of burdens upon interstate commerce and, as above quoted, it was well expressed in *Pensacola Tel. Co. v. Western Union Tel. Co.*, *supra*, that as the powers of Congress "were entrusted to the general government for the good of the nation it is not only the right, but the duty of Congress

to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."

In none of the cases has this court said that *navigation* or *transportation* was commerce only as an incident to bargain and sale, or exchange of commodities, but has invariably said that it was "something more" than bargain and sale, or interchange of commodities; that it was "intercourse;" that it prescribed the rules "for carrying on that intercourse," *Gibbons v. Ogden*. Accordingly, in *Covington, etc., Bridge v. Kentucky*, this court said that commerce was defined in *Gibbons v. Ogden* as "intercourse," and that "the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool." Thus is "intercourse" defined to include the *transit of people* over a bridge, and, accordingly, it is made evident that this court, even as early as *Gibbons v. Ogden*, so defined commerce as to include the transit of persons from one State to another, whether by transportation by a common carrier or as pedestrians, or as drivers of their own vehicles or riders of their own beasts.

The decision in *Hanley v. K. C., etc., Co., supra*, is in point, and conclusive against the State's contention, for in that case there was *no interstate transaction between consignor and consignee* to which interstate transportation could be incidental so as to become interstate commerce, for the transaction therein between consignor and consignee was *intrastate*, and not *interstate*, commerce, both consignor and consignee being located in Arkansas. To the decision made it was, consequently, indispensable to hold, as this court did hold and declare, that the *transportation itself* was interstate commerce "irrespective of the purpose to sell or retain the

goods which the owner may entertain with regard to them after they shall have been delivered."

If "transportation for others as an independent business" is commerce "irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered," how can it be that transportation of liquor from Ohio to Kentucky is not commerce, unless the owner "entertain with regard to them" some specific purpose regarding their sale?

Not only is it established by this court's decisions, but it is unquestionable upon principle that transportation interstate is interstate commerce irrespective of the transaction between consignor and consignee, for this is the basis of the *Act to Regulate Commerce*, and that act has been upheld by this court's decision in *Interstate C. C. v. C. N. O. & T. P. Ry. Co., 162 U. S. 184, 40 L. Ed. 935, and same v. T. & P. Ry. Co., Ibid 197, 40 L. Ed. 940.*

The Act to regulate Commerce has, and can find, no basis except the *Commerce Clause* of the *Federal Constitution*, and if transportation be interstate commerce only when an incident to a bargain and sale, or to an exchange of commodities, then the *Act to regulate Commerce* can apply only to such transportation from one State to another as may be incidental to such bargain and sale, or exchange of commodities. The first section of the act must, therefore, be unconstitutional *either* so far as it affects all other transportation, *or* be void *in toto* because it expressly regulates all transportation interstate whether incidental to such bargain and sale or exchange of commodities, or not. *Trade Mark cases, 100 U. S. 82, Ills. Cent. R. R. Co. v. McKendree, 203 U. S. 514, etc.*

The Act to regulate Commerce contains no limitation to cases where the transportation is based upon a bargain and sale, or an exchange of commodities between consignor and

consignee, and if it did it would be virtually impracticable of operation. In such a predicament the carrier must determine at his peril in every case of interstate transportation whether he were governed by the Federal or State law, and must make such determination at his peril without any opportunity to ascertain the facts upon which his decision must be based. If Congress has power to regulate commerce only when incidental to completed contracts between consignor and consignee, its power of regulation could not be declared that power described in *Gibbons v. Ogden* as "complete in itself," or as such as "may be exercised to its utmost extent," or as acknowledging "no limitations other than are prescribed in the Constitution," nor as a "power to limit and restrain it (commerce) at pleasure."

If Congress has no power to regulate rates, nor to prescribe other rules for the transportation of commodities from one State to another, but each of the States *en route* may prescribe the rates and the rules of such transportation unless the transportation be incidental to a completed contract between consignor and consignee, the carrier must in each case determine at his peril the existence and the nature of the relations, if any, between consignor and consignee. He must determine whether a contract has been made, and, if made, whether the *lex loci contractus* be the law of the State of origin or of the destination of the shipment. If in the State of destination, he must determine whether under the laws of that State the contract be valid or void; if in the State of origin he must sit in judgment upon the same proposition. The decision in every instance must be at the carrier's peril. Better illustrations of the unsoundness of opponent's contention than the instant cases could not be adduced, for in the *Adams cases* there was consignee's assertion that there was no order from the consignee upon the con-

signor for the goods transported, while in the *American case* there was an order, but it was held by the jury to be a forgery. In the Adams cases the carrier was required by the judgment of the State Court to know and, therefore, to inquire, whether or not an order had been given by the consignee upon the consignor for the liquor, and in the *American case* to know, and therefore to determine, whether or not the consignee had executed the order actually received by the consignor. A State statute which requires a carrier, through its receiving agent, to determine not only whether or not a consignee has assumed to give an order, but also to determine whether or not an order actually produced is valid or a forgery constitutes an obstruction to interstate commerce, an encroachment upon the powers of Congress to regulate commerce, and an interference with the actual regulation prescribed by the Interstate Commerce Act.

## The carrier's knowledge of the relations, if any, between shipper and consignee is immaterial to the question of interstate commerce.

In both the Adams Express cases and the American Express case the Kentucky Court discusses the question of the carrier's knowledge on the subject of an order by the consignee upon the consignor for the liquor, but it is not quite clear whether the court considers the carrier's knowledge and inquiry material to the question of interstate commerce, or not. The court, apparently, considers the question of knowledge material to the question of the carrier's guilt, but whether as material to the question of the existence of interstate commerce, or as an element of crime under the jurisprudence of the State, is not clear. Guilty knowledge

is essential to guilt under the State law (see *State v. McDonough, 84 Maine, 488*; *State v. Swett, 87 Maine, 113, 32 Atl. Rep. 806; Ellington v. State, 86 Southw. Rep. 330, Texas*, March 23, 1905), and peradventure the court considered the question of knowledge as material under the State law governing crimes, and not as affecting the existence of interstate commerce.

Assuming, however, for sake of the argument, that the carrier's knowledge was by the State Court treated as material to the question of the existence of interstate commerce we not only have the most lamentable confusion of legal principles, but a doctrine destructive of interstate transportation. If the transportation in these cases was interstate commerce it was the right, if not the duty, of the carrier to transport the goods, for liquor is an article of commerce. If the transportation be commerce, the carrier's knowledge on the subject of the transaction between consignor and consignee can not make it more or less commerce. If such transportation be commerce, the carrier's knowledge that no title had passed before time for delivery could not affect the carrier's rights because the State would have no right to regulate the transportation. *E converso*, if the transportation be not commerce unless incidental to a previous sale and there were no sale, the carrier's ignorance of the truth could not make the transaction interstate commerce, nor clothe Congress with any power concerning the transportation, nor diminish the power of the States over it. Under no circumstances, therefore, could the question of the carrier's knowledge affect the Federal Question, now presented.

If, however, the carrier's knowledge of the relations, if any, between consignor and consignee be assumed material under the State Statute to the present Federal inquiry, then the State

law making it so material is a serious obstruction to interstate commerce. That it is so serious as to be condemned as an unwarranted State regulation of interstate commerce is a familiar doctrine to this court.

In *Vance v. Vendercook, etc., 170 U. S. 438*, this court said "that a State law which denies such, a right (the right to send liquors from one State into another) or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

The late decisions of this court above cited have so often announced the same doctrine that further citation of authority is unnecessary.

If the carrier's knowledge be material to guilt, it can always be established, no matter upon how slender a foundation, when the transportation conducted by the carrier is unpopular in the territory of the forum, as is demonstrable by the records in the instant cases. Wherever knowledge is material, the information which inquiry would obtain when inquiry is incumbent is equivalent to knowledge. Accordingly in case No. 332 (*Rec. 23*) the court said that the carrier's guilt was established, although it said (*Rec. 25*) that there was "no direct evidence upon which one could lay his finger and say this showed knowledge," etc., and the court remarked the fact that the delivering agent did not notify consignee of the goods' arrival, showing that he expected him notified in other ways, while the court, in case 583 (*Rec. 30*), said that it appeared—

> "from the evidence that Graham failed to call for or inquire about the package until notified of its arrival, which would not have been probable if he had ordered and was expecting it," etc.

Thus, in case *332* the receiving agent's guilty knowledge is made to arise from his expecting the consignee to call for

the whiskey without notice from him, and in *583* to arise from the failure of the consignee so to call. In case *332* the agent is affected with guilty knowledge by finding the consignee cognizant, without notice from him, of the arrival of the goods, while in case *583* the agent is so affected by finding the reverse, *to-wit*, that the consignee was not cognizant until receipt of the agent's notice of the goods' arrival. Thus, as aforesaid, knowledge can always be found if essential to guilt, and the court will not disturb the verdict of a jury if there exist any surmise upon which to base it.

If, therefore, ignorance of the illegality, if any, attending the transaction between consignor and consignee be material to the carrier's exculpation, he could never know his rights or duties until he had heard from the jury and the court. A State law so affecting an interstate carrier is an obstruction to interstate commerce, and violates the Commerce Clause of the Federal Constitution.

It is not pertinent in this connection that the State, in enacting prohibition laws, is conferring a great benefit upon many people, nor that,

> "if such a transaction as is here presented is permitted, it would not only render impossible the enforcement of prohibition in local option districts, but would, also, in large measure, place the retailing of spirituous liquors in this State in the hands of irresponsible dealers, who, though not themselves amenable to the jurisdiction and process of the courts of the State, can, through their willing instruments, the express companies, violate its laws with impunity. We can not afford to set in motion such a train of evils,"

(*Rec. 31*), for the Constitution can neither be ignored nor suspended to meet an isolated hardship. The doctrine that

would relieve the hardship in one case, would beget it in many, for, although the unpopular transportation in this case be of obnoxious intoxicants, *in another case it might be of indispensable food or clothing*, produced by a rival State, and the exigency presented be exactly the emergency which begot the Commerce Clause, *viz.*, to untrammel *intercourse* and prevent obstruction to commerce. *Railroad Co. v. Husen, 95 U. S. 465; Minnesota v. Barber, 136 U. S. 313; Brimmer v. Rebman, 138 U. S. 78, etc.*

This court, while appreciating the State's anxiety to prevent intemperance, announced, in *Scott v. Donald, 165 U. S. 91*, the obligation of courts to enforce the Constitution-saying:

> "The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief. So long, however, as State legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles."

No question can here arise as to the degree of State regulation of interstate commerce permissible, nor as to the extent to which the State legislation affects the commerce for, *first*, the State Statute absolutely forbids the transportation, and, *secondly*, this court has held in almost numberless cases that similar statutes forbidding or regulating the importation of intoxicants are void as attempts to regulate interstate commerce. *License Cases 5 How. 504, 576, 12 L. ed. 256, 288. Bowman*

*v. C. & N. W. Ry. Co., 125 U. S. 465; Leisy v. Hardin, 135 U. S. 100; Rhodes v. Iowa, 170 U. S. 412, 42 L. Ed. 1088; American Express Co. v. Iowa, 196 U. S. 193, 49 L. Ed. 417; Adams Express Co. v. Same, Ibid, 147, 49 L. Ed. 424; Heyman v. Southern Ry. Co., 203 U. S. 270, etc.*

**The conduct of the consignor and that of the carrier are governed by different principles.**

The principles governing the conduct of persons shipping intoxicants into a forbidden territory and those governing common carriers transporting them are widely different, for the latter are so conditioned that the exercise of their rights and discharge of their duties are easily obstructed. Their business is transportation, and their transportation agents are neither qualified nor conditioned to institute inquiries concerning the requirements of the laws of the several States, and even distant States; nor to decide the questions arising suddenly, and variously, under those laws. To require of carriers prompt decision of such, nice, questions of law, or of fact, is not only unreasonable and unjust, but constitutes a serious hindrance to transportation and, therefore, to commerce. Better illustration of this truth than the *instant case* is not accessible. *Instruction 2* (*Rec. 29*), condemns the carrier unless the whiskey had been previously ordered of Stone by Graham, and Stone produced an order supposed to have been made by Graham, but by him pronounced spurious. In such a complication the carrier is utterly helpless. The particular instruction here found, however, (*No. 2, Rec. 29*) is erroneous under any assumption, for it convicts the carrier with or without knowledge of the existence of Graham's order, and the carrier is required to decide at his peril

whether or not Graham signed the order. This requirement is destructive of safety to the carrier, for he has no facilities for determining the question confronting him. The State Court remarked that the consignor, Stone, was not acquainted with the consignee, Graham, and that "no attempt was made to prove by the latter's neighbors, or acquaintances that the order was in his own handwriting." (*Rec. 29.*) But, verily, if the carrier if shown by the consignor the order from the consignee in a distant State must, *if intrusted by the consignor with the order at all*, take the expert opinions of the consignee's neighbors upon the genuineness of the consignee's signature before undertaking transportation, there is surely an end to commerce for the carrier must indeed act at his peril. Unquestionably, a conviction based upon such an instruction required by the State Statute as construed by the State Court must be reversed, but even had *Instruction No. 2* (as did *Instruction No. 4, concerning the carrier's knowledge of the box's contents*), allowed the carrier's exoneration if he "did not know nor had reasonable grounds to believe" that the order was a forgery, the judgment affirming conviction under the instruction would be reversible because the law requiring it would constitute an obstruction to commerce.

We have shown that an order or a contract of sale is not essential to commerce, but that transportation itself is commerce, but irrespective of this question the carrier's knowledge or ignorance of the order or the contract could not be made essential without constituting a material hinderance to commerce. A State law requiring a carrier to ascertain the nature of the transaction, if any, between the consignor and consignee would constitute the most serious obstruction to commerce because the transaction is *inter alios* and knowledge of the circumstances attending it is not accessible to

the carrier. If the carrier be required to ask information of the consignor, he may nevertheless be deceived by him. The consignor may allege a verbal order or produce a forged written order and, nevertheless, circumstances so suspicious may exist as to require further inquiry by the carrier. In other words, the carrier may have *reasonable ground to believe* that the consignor's information is untrue. The carrier's receiving agent may know the consignor to be unreliable, he may have been repeatedly previously deceived by him, and he may suspect from knowledge of the shipper, or the consignee, or from various imaginable circumstances that the consignor's statements are untrue, and in every such case the jury in a distant State must determine whether or not the carrier *had reasonable ground to believe* that the intoxicant had not been ordered.

Moreover, the carrier has no right to demand an inspection of goods offered for shipment. *The Nitro-glycerine case, 15 Wall, 524*, declares that a contrary

> "doctrine would be attended in practice with great inconvenience, and would seldom lead to any good. Fortunately, the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him in cases free from suspicion, to require information as to the contents of packages offered as a condition of carrying them."

See also *Hutchinson on Car. Sec. 439, and 7 Rose's Notes 929.*

Even inspection of the contents of a package, though, would shed no light on the relations between consignor and consignee, nor advise the carrier whether or not the shipment was pursuant to a previous order or contract.

If conviction, involving fine, and even imprisonment (*see Instruction 1*, *Rec. 29*), be the consequence of a mistake the carrier must not accept the shipment without time and opportunity for investigation, and, consequently, he would, justifiably, seriously delay many legitimate shipments. Thus legitimate and illegitimate shipments are obstructed, transportation is obstructed, and so commerce is obstructed.

It results from a review of this court's decisions, and from the principles deducible from them, that "transportation for others as an independent business is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered;" that, consequently, a previous order from consignee to consignor for the goods, or contract of sale of them is not essential to make the transportation commerce; that Instruction *No. 2* (*Rec. 29*), making the delivery of the whiskey criminal unless Graham previously ordered it of Stone, approved by the Appellate Court (*Rec. 31*), so construes the State Statute as to bring it into conflict with the Commerce Clause of the Federal Constitution, and plaintiff's assignments of error are sustained; that had the instruction even permitted the carrier's exoneration if ignorant of the forgery of the order, the statute forbidding the transportation would have nevertheless constituted a regulation of, and an obstruction to commerce, and been unconstitutional; and we insist, further, that the statute, as construed by *Instruction 4*, constitutes a regulation of and an obstruction to interstate commerce in requiring the carrier of interstate commerce to stop to investigate the contents of every package delivered to him for transportation when reasonable grounds to believe that it contains intoxicants exist. What may be "reasonable grounds to believe" is a mixed question of law and fact for the jury under the judge's charge, and what its resolution in

any case may be can not be known in advance of the jury's verdict. This uncertainty is so great as to render a statute punishing a carrier for charging more than "a just and reasonable rate" unconstitutional. *L. & N. R. R. Co. v. Commonwealth*, *99 Ky. 132, 33 L. R. A. 209; McChord v. C. N. O. & T. P. Ry. Co., 183 U. S. 483, 46 L. Ed. 289.* Unquestionably, therefore, the imposition of such a requirement imposes an obstruction to commerce. A perusal of the testimony in the *instant* case and its review by the Appellate Court show how little evidence of such reasonable ground for belief will sustain a conviction. (*Rec. 30.*)

## A State Statute offends the "Commerce Clause" of the Federal Constitution in imposing upon a common carrier the burden of ascertaining the nature of the contents of an interstate shipment when having reasonable ground of belief as to such contents.

The State Statute as construed by Instruction 4, holding the carrier criminal in transporting intoxicants into local option territory, if he knew or had reasonable ground to believe that the package contained intoxicants, imposes an obstruction upon interstate commerce and is a regulation of such commerce in violation of the Federal Constitution, and plaintiff's *fourth* assignment of errors (*Rec. 40*) claiming immunity from such State regulation is maintainable.

The ground of this assignment has been herein before incidentally discussed. All such hindrances to the free operation of interstate transportation amount to obstructions to commerce, and to illegal regulation thereof. In *Bowman v. Chicago & N. W. Ry. Co. 125 U. S. 465*, this court held an Iowa statute making a certain certificate a condition prece-

dent to the right to transport liquors into Iowa a regulation of interstate commerce, and a violation of the "Commerce Clause;" saying,

> "It can not be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the States."

In *Vance v. Vandercook Co., 170 U. S. 438, 444*, this court speaking of the right "to send liquors from one State to another" said that it was established, "that a State law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

In *W. U. Tel. Co. v. Call A. C. Co., 181 U. S. 92, 102*, this court said that the principles of the common law were operative "upon all interstate commerce transactions except so far as they are modified by congressional exactment."

That at common law, a carrier has no such obligation of inspection of packages, nor of demanding of the consignor information concerning their contents is shown by the language herein before quoted from the *Nitro-glycerine case, 15 Wall, 524*, and by the English case of *Crouch v. London and N. W. Ry. Co., 14 C. B. 255, 291*, therein cited, and by the *text writers.*

The foregoing objections to the Kentucky Statute are so enhanced by the Kentucky Court's construction of the act as to constitute additional grounds of its unconstitutionality, offending both the *Commerce Clause* aforesaid and the *Fourteenth Amendment* to the *Federal Constitution.*

II.

*a*

The Kentucky Court said, in *instant case No. 583* (*Rec. 30*):

"It may be said here as held in Adams Express Company vs. Comlth. 92 S. W. 932: 'The Commonwealth proved facts which of themselves established the guilt of the defendant company.' It showed the existence of the prohibition law in the town of Hodgenville, the delivery of liquor by appellant to Graham, and the payment of the price by the latter to its agent. These facts make a case for the Commonwealth, unless appellant's explanation of the transaction presented such a defense as took it out of the statute, the burden of showing which was upon it. If the jury were of the opinion that this was not done by the evidence, it had the right to find appellant guilty."

In *instant case No. 332* (*Rec. 23*), the Kentucky Court, including the language just quoted, said:

"The Commonwealth proved facts which, of themselves, established the guilt of the defendant company. It showed the existence of the prohibition law in Knox County, the delivery of liquor by the defendant to Main, and the payment of the price by the latter to the company's agent. These facts constituted an offense under the prohibition laws prevailing at the place of sale, and the defendant is guilty unless it has a defense which takes the transaction from without the operation of the State Statute. It seeks to do this by alleging that the transaction was interstate commerce. The burden to

establish this fact is upon the defendant. * * * When the Commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to the satisfaction of the court or jury, or else be condemned. Did the defendant show that the transaction, out of which grew the offense with which it stood charged, was interstate commerce? The answer to this must be in the negative." * * *

"Suppose, instead of the defense being interstate commerce, it had been license, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and that the latter was duly licensed to carry on the business, would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be imperative upon it to show, not that it honestly believed, but that it *was* the agent of a licensed dealer? In the case at bar the defendant undertakes to show that it was the agent of the consignor, and that it believed the consignor's acts were legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not." (*Rec. 24.*)

The court had already said (*Rec. 21*):

"The first and crucial question in this case is, whether or not the shipment and delivery of the whiskey was an act of interstate commerce?"

The doctrine just quoted evidently makes criminal an act not only innocent but constituting the performance of a duty, *to-wit*, interstate transportation, and permits the carrier's exoneration solely by its satisfying the jury

that its act is interstate commerce. Accordingly, in the *instant case, No. 583*, the American Express Company is permitted to sustain the burden of proving its innocence by showing that one Richard Graham, a man in another State actually signed the order which the consignor in Cincinnati had when he (or she) consigned the unmarked package to said Graham at Hodgenville, and it appears from the court's opinion (*Rec. 29*), that it was incumbent upon the carrier to make endeavors to prove the genuineness of the consignee's signature "by the latter's neighbors, or acquaintances," that might be familiar with his handwriting. Obviously, the statute imposing upon an interstate carrier the burden of explaining transactions *inter alios*, carried on between consignor and consignee, and of establishing facts provable only in a distant State, virtually accomplishes the carrier's conviction by proof of acts not only innocent, but carrying no semblance of guilt. A carrier can never know in advance until the verdict of the jury, whether or not an order has been given by the consignee to the consignor for goods. Even the consignor's oath that a verbal order were given, or his production of a written order, as aforesaid, does not relieve the carrier if it turn out at the trial that the consignee gave no order, or even that his name was forged to a written order. Even the consignee's ratification of the unauthorized act of some one signing his name to the order, does not relieve the carrier, although it makes a contract with the consignor, for the jury was instructed to convict "unless said whiskey had been ordered by Graham previously," etc.

The Kentucky Court's hypothesis is that a contract of sale must exist before the acceptance by the carrier of the goods and that the burden of proving such sale, and proving it to be valid, is upon the carrier. The statute so construed virtually forbids the transportation of liquor from another

State into Kentucky local option territory (and this the Kentucky Court intends, *Rec. 31*), and constitutes a serious obstruction to commerce. As aforesaid, if the statute, instead of forbiding the delivery of whiskey, forbade the delivery of articles of food or clothing proscribed by the State, the case would not be different. The statute, consequently, must be condemned like the many statutes condemned in the divers cases hereinbefore cited.

*b.*

The statute as above construed constitutes not only an obstruction to commerce and an illegal regulation of it, but even infringes the *Fourteenth Amendment* and sustains our *fifth* assignment of errors (*Rec. 40*).

Mr. Cooley says (*Const. Lim. 6th Ed., p. 374, 7th Ed., p. 436:*

> "Perhaps the most important of the protections to personal liberty consists in the mode of trial which is secured to every person accused of crime."

He further says, *p. 375 (437):*

> "First, we may mention that the humanity of our law always presumes an accused party innocent until he is proved to be guilty. This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact."

Among the cases cited in support of his text are the following:

In *Sullivan v. Oneida, 61 Ill. 242*, the court held a Statute making the killing of cattle by a railroad train *prima*

*facie* evidence of negligence, and such negligence a misdemeanor in the Superintendent and President, to be unconstitutional as depriving the accused of the presumption of innocence.

In *State v. Divine, 98 N. C. 778, s. c. 4 Southeast Rep. 477*, the court held that a statute making *prima facie* evidence of negligence *in a criminal prosecution* the killing of live stock subverted the presumption of innocence, deprived the accused of *due process of law*, and was not sanctioned by the Constitution. The court said :

> "The Act is in violation of Section 17 of the Declaration of Rights of North Carolina: 'No person ought to be * * * in any manner deprived of his life, liberty or property but by the law of the land.' And also of the Fourteenth Amendment: 'Nor shall any State deprive any person of life, liberty or property without due process of law.'
>
> "These provisions were directed against the arbitrary and oppressive exercise of the powers of government. They were intended to fix a limit beyond which the law-making power should not go in the direction of oppression to the citizen, and to establish for his protection certain safeguards, of which no earthly power could ever deprive him so long as the judges shall continue faithful to duty. * * * They intend, clearly, that no person shall be assailed in person or property without notice and an opportunity for defense." (Citing authorities.)

After reviewing *Murray's Lessee v. Land Co., 18 Howard, 227*, and similar cases in State courts, the court recited the State Statute making the killing of live stock by engines

*prima facie* evidence of negligence in criminal proceedings, and said:

> "Thus, in every criminal prosecution under this Act, the defendant is deprived of the benefit of that great and fundamental rule of the common law, that every man shall be considered innocent until proved to be guilty. Nor is that all. The result of that deprivation would simply be to leave the question of guilty or not guilty an open one of fact for the jury. But the Act goes far beyond that, and not only takes away the presumption of innocence, but imposes upon the defendant a presumption of guilt, and requires him in every case to prove his innocence. Such an Act can not be respected as the law of the land."

Citing the language above quoted from Cooley, the court quoted from *Cummings v. Missouri, 4 Wall. 328, 18 L. Ed. 364*, Mr. Justice Field's language as follows:

> "And this is not all. The clauses in question subvert the presumption of innocence, and alter the rules of evidence which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties."

In *State v. Beswick, 13 R. I. 211*, the court, concerning a statute making the keeping of implements and appurtenances usually appertaining to grog shops *prima facie* evi-

dence of the guilt of the crime of keeping such a shop, said, *p. 216:*

"It will be observed that the statute makes proof of the facts mentioned in it (notorious character of the premises, or notoriously bad or intemperate character of persons frequenting the same, or the keeping of implements or appurtenances usually appertaining to grog shops, etc.), not only evidence against the accused, but *prima facie* evidence of his guilt, so that upon proof of them it is not only the right but the duty of the jury to convict, unless the presumption is rebutted by other evidence, though of course such other evidence may be elicited from the witnesses for the State as well as given by witnesses for the defendant." Citing *Commonwealth v. Pillsbury, 12 Gray, 127.* "The question then is, whether a statute is constitutional which makes it the duty of a jury, impanelled to try a complaint for unlawfully keeping liquors for sale, to convict the accused upon simple proof that his place of business is notorious as a place where liquors are unlawfully kept for sale, etc., without more, unless there be other evidence to rebut or control it.

"We have carefully considered the question, and have come to the conclusion that the statute is not constitutional. It virtually strips the accused of the protection of the common law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not 'be deprived of life, liberty or property, unless by the judgment of his peers or the law of the land.' What is

meant by 'the judgment of his peers' is the judgment of a jury, and certainly the accused does not have the *judgment* of a jury, if the jury is compelled by an artificial rule to convict him, whether they think him guilty or not, upon proof of a fact which is consistent with his innocence, and which is so consistent with his innocence that proof of it at common law would not even be admissible against him."

Analyzing the phrase "the law of the land" the court declares:

"It was borrowed from *Magna Charta*, and as has been repeatedly decided, means the same as 'due process of law.' The question then is, whether if a man is convicted on the testimony indicated, and under the rule prescribed by the statute, he is convicted according to 'due process of law'."

Liberally expounding "due process of law" the court declares, *p. 218*:

"The effect in criminal prosecutions is to secure to the accused, before condemnation, a judicial trial, if not strictly in all points according to the common law, at least not in violation of those fundamental rules and principles which have been established at common law for the protection of the subject or the citizen. Among these rules there is none which is more fundamental than the rule that 'every person shall be presumed innocent until he is proved guilty.' 'This rule,' said Judge Selden in *The People v. Toynbee*, 2 Park Cr. 490, 526, will be found specifically incorporated into many of our State Constitutions, and is one of those rules which in our Con-

stitution are compressed into the brief but significant phrase, 'due process of law.' Indeed, to hold that a Legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even the constituent part of the crime when committed is to hold that it has the power to take away from the judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the Legislature has power to bind and circumscribe all judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. It is true the accused has the right of defense left to him, and may, if he can adduce satisfactory evidence, rebut the statutory presumptions; but the production of such evidence is not always easy, even with the right to testify in his own behalf; and the right to testify in his own behalf having been granted can be abrogated by the Legislature, etc."

In a note by the Chief Justice, *p. 220*, it is observed that the declaration of rights adopted by the Continental Congress, in 1774, declares the inhabitants of the colonies entitled "by immutable laws of nature, the principles of the English Constitution and the several charters and compacts" to certain rights enumerated, including, *to-wit*, "that the respective colonies are entitled to the law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinity according to the course of that law." With this quotation the Chief Justice observes:

> "This probably shows how the provision in question was understood by the great lawyers of the Revolution."

This able opinion, and other quotations herein from others demonstrate that the *presumption of innocence* was so

imbedded in the principles of the common law when adopted as a part of our jurisprudence as to be a constituent element of *due process of law*.

In *Wynehamer v. People*, *13 N. Y. 446*, the court in an elaborate opinion said:

"But a point of still greater interest arises upon the first branch of Sec. 17, which provides that, 'upon the trial of any complaint commenced under any provision of this Act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be prima facie evidence of sale.' There are two classes of cases upon which this provision operates with great severity. Although the Act does not prohibit the safe keeping of spirituous liquor or the giving it away in a private dwelling, yet by this clause the mere delivery is made prima facie evidence of an unlawful sale without exception as to the place; no one, therefore, can in his own house give a glass of wine to a friend, without thereby affording prima facie evidence to convict him of a misdemeanor." (*P. 244.*)

"But the operation of the section upon another class is equally onerous; I mean the class of licensed vendors. Sections 2 and 3 expressly authorize certain persons to sell, who are required to give ample security not to violate any provision of the Act, and yet, by force of the clause in question, every sale they make affords prima facie evidence to convict them. The Act presumes against the innocence of its own selected agent, and will not permit this presumption to be rebutted until such agent consents to make himself a witness in the case. This provision raises the vital question, as to the value of that clause in the Constitution which secures to every man charged

with crime a trial by 'due process of law.' The most important guarantees of individual right which our Constitution affords are concentrated in this single phrase."

After elaborate citation of authorities the court declares, *p. 446 :*

"If this interpretation is correct, and it is sustained as well by history as by judicial authority, the clause in question was intended to secure to every citizen the benefit of those rules of the common law by which judicial trials are regulated, and to place them beyond the reach of legislative subversion. They are, indeed, virtually incorporated into the Constitution itself, and made thereby a part of the paramount law. Trials, therefore, at least such as are criminal, are to be regulated and conducted, in their essential features, not by statutes, but by common law. This the Constitution guarantees. Precisely how far the Legislature may go, in changing the modes and forms of judicial proceeding, I shall not attempt to define; but I have no hesitation in saying that they can not subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is proved guilty." "This rule will be found specifically incorporated into many of our State Constitutions, and as one of those rules which, in our Constitution, are compressed into the brief but significant phrase, 'due process of law.' "

After elaborate discussion the court declares :

"Where the common law would presume innocence, this Act presumes guilt. Either the guarantee of a judicial trial, according to the course of the common law, is a nullity or this provision is void."

In *Ellington v. State* (*Texas Crim. App.*) *86 Southw. Rep. 330*, a judgment convicting an express agent of selling liquor because he had delivered an interstate shipment C. O. D. in forbidden territory was reversed, the court saying, *p. 331*:

"Appellant was not aware of the fact that the shipment was not in pursuance of a contract. The presumption in such cases is that the transaction was legitimate, and the shipment was not violative of the law. All presumptions are in favor of innocence, and this presumption is matured into a fact by the testimony here presented. He was acting as the agent of the Wells-Fargo Express Company, which company, as common carrier, brought the goods from Shreveport, in Louisiana, to Timpson, in Texas. There are some fundamental principles underlying our criminal law necessary to be kept in view when trying men charged with offenses: First, that all parties are presumed to be innocent; second, the reasonable doubt obtains in their favor; third, if there is such doubt on the testimony, the accused is entitled to an acquittal; fourth, if there is a mistake of fact, the party is entitled to an acquittal. It therefore follows that, in order to hold appellant guilty, he must have known that this was an illegal shipment; that there was no contract behind the parties authorizing the shipment; and that he turned over the goods to Rutherford with the knowledge of these facts. The statement of facts excludes this condition of case. That the shipping party at Shreveport, La., was the owner of the goods, and sent them through the express company, and tendered them to Rutherford at Timpson, would not make appellant guilty of a sale in delivering the goods, unless he knew those facts. It may

be conceded that the shipper was the owner of the goods when received at Timpson, and they were there tendered to Rutherford by the shipper, through the express company; that they were his goods at Timpson, and not Rutherford's, until Rutherford had accepted; and if appellant had known these facts when he delivered the goods he might be held criminally responsible, but in the absence of such knowledge he would not be guilty."

This court has in several cases given consideration to the "presumption of innocence" but in none decisive of the question now presented.

In *Mugler v. Kansas, 123 U. S. , 31 L. Ed. 205*, the objection to *Section 14* of the statute dispensing with the necessity of the State's proving that the sale was without license was denied by this court upon the ground that the statute simply relieved the State *of proving a negative*, and only required the accused to prove what was *presumptively within his own knowledge;* accordingly, this court said:

"Touching the provision that in prosecutions, by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the State has proven that the place described is kept and maintained for the manufacture or sale of intoxicating liquors —such manufacture or sale being unlawful except for specified purposes, and then only under a permit—the prosecution need not prove a negative; namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily pro-

duce it, and thus overthrow the *prima facie* case established by the State."

Obviously the grounds for the decision in *Mugler v. Kansas* are inapplicable here because the relations between consignor and consignee, and the genuineness of consignee's (Graham's) handwriting, are not matters presumptively within the carrier's knowledge, but are *res inter alios*.

In *Coffin v. United States*, *156 U. S. 432, 39 L. Ed. 41*, this court in a most elaborate and learned opinion, asserted the fundamental and inviolate character of the "presumption of innocence," and held that the charge by the judge to the jury of the necessity of proving guilt "beyond a reasonable doubt" did not dispense with his duty to charge the defendant's right to the "presumption of innocence." There was much discussion of the distinction between the cases where the defendant requested the charge and where he did not, but this discussion is immaterial in Kentucky where it is the duty of the trial judge to charge the jury upon the entire law of the case without any request; *Heilman v. Com. 84 Ky. 457, s. c. 4 Am. State Rep. 207.*

Concerning the trial court's charge that the burden of proof had shifted from the prosecution to the accused, this court said, *p. 461:*

> "The error contained in the charge, which said substantially that the burden of proof had shifted under the circumstances of the case and that therefore it was incumbent on the accused to show the lawfulness of their acts was not merely verbal, but was fundamental, especially when considered in connection with the failure to state the presumption of innocence."

See, also, *Cochran v. U. S., 157 U. S. 286, 298; s. c. 39 L. Ed. 704, 708; Agnew v. United States, 165 U. S. 36, 41 L. Ed.*

*624; and Kirby v. U. S., 174 U. S. 47, 55; s. c. 43 L. Ed. 890, 894.*

The foregoing review of the able opinions of so many eminent judges suffices to establish that the Kentucky Statute as construed by the Kentucky Court, both in *case 332* (*Rec. 23*) and *583* (*Rec. 30*), as is just quoted above, making a mere delivery of liquor and collection of the price in the forbidden territory *prima facie* evidence of guilt deprives the accused of *due process of law*, and sustains our *fifth* assignment of error. (*Rec. 40.*)

In probably none of the cases involved did the accused stand more in need of *due process*, for, as was shown, the imposition upon them of the burden of showing the contract between consignor and consignee was next to insuperable. In order to show a contract the Express Company must not only introduce the consignor and consignee if accessible, but if dead or inaccessible the Company must be convicted by a presumption of guilt from proof of facts perfectly innocent, *e. g.*, the delivery of an interstate shipment and collection of the price. (*Am. Exp. Co. v. Iowa, 196 U. S.*) Even according to the State Statute, as construed by the State Court, the transportation, delivery and collection of the price are innocent if a previous order for or sale of the goods exist, and they may exist and, nevertheless, the Express Company be unable to establish the facts if witnesses are dead or inaccessible.

Again, where a written order exists the Express Company has the burden to prove, not only the existence of the order, but "to prove by the latter's (consignee's) neighbors or acquaintances that the order was in his handwriting," (*Rec. 29*).

## CONCLUSION.

Upon the foregoing considerations, and others which will occur to the court, we submit that our assignments of error are sustained, and that the judgment of the Kentucky Court of Appeals should be reversed because the statute under which plaintiffs were convicted offends both the *Commerce Clause* and the *Fourteenth Amendment* of the *Federal Constitution.*

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